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No. _____

In The

Supreme Court of the United States

October Term, 1998

CHARLES CUNNINGHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER TOTALLY EXCULPATORY TESTIMONY OF A WITNESS WHO WAS UNAVAILABLE AT THE TIME OF TRIAL CONSTITUTES NEWLY DISCOVERED EVIDENCE UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 33.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, CHARLES CUNNINGHAM, by his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, affirming the denial of his motion for new trial pursuant to Rule 33, Federal Rules of Criminal Procedure, entered in the proceedings, with rehearing and suggestion for rehearing en banc denied August 3, 1998.

OPINION OF THE COURT BELOW

The written opinion of the Court of Appeals for the Eleventh Circuit is included in the appendix. *United States v. Cunningham*, No. 97-5242 (11th Cir. Apr. 8, 1998). [App. 1.]

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1998. The timely petition for rehearing and suggestion for rehearing en banc was denied on August 3, 1998. This petition is filed pursuant to Rule 13, Rules of the Supreme Court. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254(1).

APPLICABLE PROVISIONS

Rule 33, Fed.R.Crim.P. provides:

> The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. . . . A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case.

Rule 15, Fed.R.Crim.P. provides:

> Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony or a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition. . . .

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to resolve an acknowledged conflict in the circuits over the definition of "newly discovered evidence" under Rule 33, Federal Rules of Criminal Procedure. The Eleventh Circuit held [App. 1] that the totally exculpatory testimony of a witness who was unavailable to the defense at the time of trial does not constitute "newly discovered evidence"

under Rule 33. The court held that such testimony constitutes newly "available," not newly "discovered" evidence, and therefore denied the petitioner's motion for new trial. The Eleventh Circuit's decision directly conflicts with the law in at least two other federal circuits. *See United States v. Montilla-Rivera*, 115 F.3d 1060 (1st Cir. 1997); *United States v. Garland*, 991 F.2d 328 (6th Cir. 1993).

Mr. Cunningham, who has steadfastly maintained his innocence, was convicted in 1992 of conspiracy to import and attempted importation of cocaine.[1] The government alleged that in 1989, Mr. Cunningham was recruited into a drug conspiracy by David Lemieux, who evaded capture by the government and was still a fugitive – and thus unavailable as a witness – at the time of Mr. Cunningham's trial.

The government's case against Mr. Cunningham was largely circumstantial. Even under the government's theory, Mr. Cunningham never touched cocaine, nor was he present for an actual off-load of cocaine. Cooperating government witnesses implicated Mr. Cunningham, testifying that Mr. Cunningham was aboard one of two vessels involved in a failed drug-smuggling effort. Mr. Cunningham, a phone company employee for 21 years with no criminal history, testified in his own defense at trial that he knew nothing of the alleged drug-smuggling plan. Rather, Mr. Cunningham's long-time friend, David Lemieux, had invited him on a fishing trip to the Bahamas.

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[1] The Eleventh Circuit Court of Appeals affirmed the judgment and sentence in June 1996. *United States v. Vega-Fleites*, Case No. 93-4013 (11th Cir. 1996).

Because David Lemieux was a fugitive from justice at the time of trial, he was unavailable to testify in Mr. Cunningham's defense. Mr. Cunningham's testimony went uncorroborated. Even so, the jury acquitted Mr. Cunningham of the substantive smuggling charges, but convicted him of conspiracy and attempt to import cocaine. Mr. Cunningham is currently incarcerated, serving the 300-month sentence imposed by the court under the Guidelines.

After Mr. Cunningham's trial, fugitive co-defendant David Lemieux was arrested using an assumed name in London, England, where he is serving a lengthy prison sentence on unrelated charges. [App. 3.] When Mr. Cunningham's defense counsel located Lemieux, he obtained a sworn affidavit from Lemieux completely exonerating Mr. Cunningham.

Mr. Cunningham filed a timely motion for new trial under Rule 33, Federal Rules of Criminal Procedure, arguing that Lemieux's affidavit constituted "newly discovered evidence." Mr. Cunningham supplemented the motion with a transcript of a taped sworn interview in which Lemieux provided more detailed testimony and confirmed his willingness to testify in Mr. Cunningham's defense at a new trial either in person or by deposition. [App. 15-45.]

In both his affidavit and sworn interview, Lemieux admitted his own involvement in the drug-smuggling conspiracy. [App. 22.] However, Lemieux confirmed that Mr. Cunningham was brought along on the boat trip as a decoy, and that Mr. Cunningham knew nothing about

Lemieux's drug-smuggling venture.[2] [App. 23, 25-27, 29-30, 32-43.]

The district court denied the motion for new trial without prejudice. [App. 10.] Interpreting Rule 33, the court concluded that Lemieux's testimony was newly "available," but not newly "discovered" evidence because the defendant himself could and did testify that he had no knowledge of the conspiracy or the presence of cocaine. [App. 7-8.] The district court reasoned that

> if Cunningham is actually innocent, then Cunningham certainly knew, even before trial, that Lemieux could testify that he knew of no facts which would demonstrate that Cunningham was involved in the conspiracy or drug offenses. Lemieux was simply ***unavailable*** to testify because he invoked [sic] he was hiding from the authorities. Lemieux's present willingness to provide an affidavit only provides a ***newly available*** means through which Cunningham can present that evidence.

[App. 8 (emphasis added).]

Apparently overlooking the option of deposing Lemieux under Rule 15, Federal Rules of Criminal Procedure, the district court also ruled that "an evidentiary hearing on this matter is premature" because "Lemieux is

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[2] Lemieux is subject to extradition to the United States on the drug charges for which Mr. Cunningham was tried and partially convicted. Lemieux faces a maximum penalty of life imprisonment if convicted. His willingness, under these circumstances, to incriminate himself in the affidavit and sworn interview while exculpating Mr. Cunningham gives his testimony a strong indicia of reliability.

currently serving a prison sentence outside the subpoena power of this Court and will not be available for the next 16 years." [App. 7-8.]

Mr. Cunningham promptly filed a renewed motion for new trial, or in the alternative to reconsider and take the deposition of David Lemieux, pursuant to Rule 15. The district court summarily denied the renewed motion. [App. 11-12.]

Without oral argument, a panel of the Eleventh Circuit affirmed the district court in an unpublished decision. The panel adopted the district court's semantic distinction between newly "available" and newly "discovered" evidence. [App. 1-2.]

Mr. Cunningham filed a timely petition for rehearing and suggestion of rehearing *en banc*, noting an intra-circuit conflict, *see United States v. Gates*, 10 F.3d 765 (11th Cir. 1993) (remanding for new trial based on newly available, exculpatory testimony of co-defendant), as well as an inter-circuit conflict. *See United States v. Montilla-Rivera*, 115 F.3d 1060 (1st Cir. 1997); *United States v. Garland*, 991 F.2d 328 (6th Cir. 1993). The Eleventh Circuit denied the rehearing petition. [App. 13.]

REASONS FOR GRANTING THE PETITION

THERE IS AN ACKNOWLEDGED CONFLICT IN THE CIRCUITS OVER THE DEFINITION OF "NEWLY DISCOVERED EVIDENCE" UNDER RULE 33, FEDERAL RULES OF CRIMINAL PROCEDURE.

In the movie "The Fugitive," Dr. Richard Kimble, played by Harrison Ford, is wrongly convicted of the murder of his wife. At trial, he testified in his own defense that he was innocent and that he saw a one-armed man kill her. He could not corroborate his story, so the jury did not believe him. Dr. Kimble, an innocent man, was sentenced to life in prison.

Desperate, Dr. Kimble escaped and hunted down the real killer. In the final scene, Dr. Kimble is driven away by U.S. Marshals, who remove his handcuffs. The audience is left confident that Dr. Kimble will walk away a free man because he can now prove his innocence.

In the Eleventh Circuit, Dr. Kimble would not walk free. In fact, Dr. Kimble would not even be granted an evidentiary hearing on his motion for new trial. Under the Eleventh Circuit's interpretation of Rule 33, Federal Rules of Criminal Procedure, this newly "available" evidence would not constitute newly "discovered" evidence because Dr. Kimble knew all along that this exculpatory evidence existed.

This petition seeks a resolution of the inter-circuit conflict on the following question: whether completely exculpatory testimony that was unavailable to the defense at the time of trial constitutes "newly discovered evidence" under Rule 33. The First and Sixth Circuits say that it does. The Eleventh Circuit in this case, along with

the D.C., Second, Fifth, and Ninth Circuits, say that it does not. The First Circuit has acknowledged the conflict. *See United States v. Montilla-Rivera*, 115 F.3d 1060, 1065-66 (1st Cir. 1997).

Rule 33 of the Federal Rules of Criminal Procedure is designed to bring the truth to the fact-finder by granting a convicted defendant a new trial where there is "newly discovered evidence" of the defendant's innocence. The Eleventh Circuit's opinion in this case holds that exculpatory testimony of a witness whose whereabouts were undiscoverable at the time of trial is not "newly discovered evidence," and therefore is not grounds for a new trial. [App. 1-2.] The circuit court adopted the district court's reasoning that such testimony merely constitutes newly "available" evidence, not newly "discovered" evidence.

According to the Eleventh Circuit, evidence is newly "discovered" only if the defendant was totally unaware of its existence at the time of trial. If the defendant knew of a witness who could clear him, but could not possibly present that witness at trial, that evidence is not newly "discovered" when the witness becomes available to testify after trial.[3] The D.C., Second, Fifth, and Ninth Circuits have adopted similar reasoning when the newly

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[3] There is an intra-circuit conflict in the Eleventh Circuit on this point. *Compare United States v. DiBernardo*, 880 F.2d 1216 (11th Cir. 1989) (post-trial testimony from convicted co-defendant not grounds for new trial) *with United States v. Gates*, 10 F.3d 765 (11th Cir. 1993) (even where new evidence is from convicted co-defendant who previously invoked the Fifth Amendment, case remanded for evidentiary hearing on motion for new trial based on newly discovered evidence).

"available" witness is a *convicted* co-defendant who was unavailable at trial because he invoked his Fifth Amendment privilege. *See United States v. Dale*, 991 F.2d 819 (D.C. Cir. 1993); *United States v. Metz*, 652 F.2d 478 (5th Cir. 1981); *United States v. Diggs*, 649 F.2d 731 (9th Cir. 1981), *cert. denied*, 454 U.S. 970 (1981); *United States v. Jacobs*, 475 F.2d 270 (2d Cir. 1973), *cert. denied*, 414 U.S. 821 1973).[4]

In contrast, the First and Sixth Circuits have ruled that a defendant's post-trial discovery of the location and availability of an exculpatory witness, including a co-defendant, is grounds for a new trial under Rule 33. *See United States v. Montilla-Rivera*, 115 F.3d 1060 (1st Cir. 1997); *United States v. Garland*, 991 F.2d 328 (6th Cir. 1993).

In *Montilla-Rivera*, the defendant moved for a new trial based on the post-trial affidavits of two co-defendants who swore that Montilla-Rivera was not involved in the crime. The two co-defendants had pled guilty, but invoked their Fifth Amendment rights and refused to testify at Montilla-Rivera's trial. Montilla-Rivera "diligently attempted to secure their testimony, [but] did not have the power to compel them to testify at his trial in light of their Fifth Amendment privileges." The district

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[4] The Seventh and Tenth Circuits have also indicated agreement with this position, albeit *in dicta*. *See United States v. Theodosopoulos*, 48 F.3d 1438, 1448-49 (7th Cir. 1995); *United States v. Muldrow*, 19 F.3d 1332, 1339-40 (10th Cir. 1994). A recent, unpublished decision of the Fourth Circuit rejected the government's distinction between newly "available" and newly "discovered" testimony of a witness not a co-defendant. *United States v. Purnell*, 155 F.3d 563, 1998 WL 405942 (4th Cir. June 9, 1998) (unpublished) (affirming new trial order).

court denied the motion for new trial because "the witnesses were known and available at the time of trial." *Montilla-Rivera*, 115 F.3d at 1063.

The First Circuit reversed and remanded for reconsideration of the motion for new trial, following the precedent of that circuit, that "the 'newly discovered' language of Rule 33 encompasses evidence that was 'unavailable' " at the time of trial. *Id.* at 1066 (citing *Vega Pelgrina v. United States*, 601 F.2d 18 (1st Cir. 1979)). According to the First Circuit,

> given the 'in the interest of justice' standard of Fed.R.Crim.P. 33, there seems little distinction between evidence which a defendant could not present because he did not know of it and evidence which he could not present because the witness was unavailable despite exercising due diligence.

Id.

The First Circuit acknowledged the conflict in the circuits on this issue. The court noted that two circuits appear to agree with its position, "[a]t least in the context of newly available evidence from one not a codefendant." *Id.* (citing *United States v. Garland*, 991 F.2d 328, 335 (6th Cir. 1993); *United States v. Ouimette*, 798 F.2d 47, 51-52 (2d Cir. 1986)). However,

> [m]ost other circuits have expressed hostility to this notion, usually on the ground that the defendant was aware of the potential testimony at trial, even if that testimony was unavailable due to assertions of privilege. These courts have held that such testimony is not newly discovered. *See, e.g., United States v. Theodosopoulos*, 48

> F.3d 1438, 1448-50 (7th Cir. 1995); *United States v. Muldrow*, 19 F.3d 1332, 1339 (10th Cir. 1994); *United States v. Dale*, 991 F.2d 819, 838-39 (D.C. Cir. 1993); *United States v. DiBernardo*, 880 F.2d 1216, 1224-45 (11th Cir. 1989); *United States v. Metz*, 652 F.2d 478, 480-81 (5th Cir. 1981); *United States v. Diggs*, 649 F.2d 731, 739-40 (9th Cir. 1981).

Id. at 1065-66.

In *United States v. Garland*, 991 F.2d 328 (6th Cir. 1993), the defendant was convicted of interstate fraud for lying to a lender about the reason he needed to borrow $75,000. Defendant Garland told the lender that he needed the money to purchase cocoa from Ghana. *Id.* at 329. At trial, defendant Garland testified that he thought he had a legitimate cocoa deal, but that he was himself defrauded by the Ghanian sellers. *Id.* at 330. There was little evidence to corroborate his story, and Garland was convicted.

In his post-trial Rule 33 motion, Garland presented the testimony of Anatole, a man who had been employed by Garland in connection with the cocoa deal, who substantiated Garland's testimony about the transaction. Garland's trial attorney testified that he had been unable to secure Anatole's appearance at trial because Anatole was in Cameroon at the time of trial and could not be reached. *Id.* at 331.

The Sixth Circuit vacated Garland's conviction and remanded for a new trial. That court stated that Anatole's testimony was newly discovered evidence. "First, although the defense knew of Anatole's existence before and during the trial, Anatole was not located until after

the trial. . . . Second, Anatole was in Cameroon at the time of the trial and had no contact with Garland or his attorneys." *Id.*

Thus, the First and Sixth Circuits do not distinguish between newly "discovered" and newly "available" evidence. In these circuits, evidence a defendant could not present at trial because he was unaware of it is treated the same under Rule 33 as evidence a defendant could not present because the witness was unavailable through no fault of the defendant. *See also United States v. Purnell*, 155 F.3d 563, 1998 WL 405942 (4th Cir. June 9, 1998) (unpublished) (affirming new trial order, court rejected government's distinction between newly "available" and newly "discovered" testimony of a non-co-defendant); *United States v. Ouimette*, 798 F.2d 47 (2d Cir. 1986) (ordering hearing on new trial motion where newly available testimony is from an eyewitness, not a co-defendant, who was allegedly pressured by police into refusing to testify but changed his mind post-trial), *cert. denied*, 488 U.S. 863 (1988). These courts reject the formalistic, semantic distinction between newly "available" and newly "discovered" evidence.

This Court should resolve the acknowledged conflict among the circuits over what constitutes "newly discovered evidence" under Rule 33. The importance of this legal issue is self-evident. The interpretation of Rule 33 adopted by the D.C., Second, Fifth, Ninth, and Eleventh Circuits puts the innocent defendant in a Catch-22: At trial, the defendant cannot persuasively establish his innocence because a key witness who could exculpate him is unavailable, through no fault of his own. When the

witness becomes available to testify post-trial, the defendant cannot even get an evidentiary hearing because the exculpatory evidence is deemed newly "available" rather than newly "discovered" under Rule 33. If the defendant is actually innocent, he can never effectively prove it.[5]

This newly "discovered"/newly "available" distinction institutionalizes an interpretation of Rule 33 that guarantees that people wrongly convicted will remain convicted. Surely, the movie audience of "The Fugitive" would not stand for it if Dr. Kimble were sent back to prison for life in the face of newly available, exculpatory evidence. Their reaction reflects the expectation that our criminal justice system will not sit idly by when new evidence comes to light proving a convicted defendant's actual innocence. *Cf. Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986) (excusing a procedural default in habeas petition where defendant makes a substantial showing of factual innocence).[6]

An interpretation of Rule 33 that prevents totally exculpatory testimony from ever reaching the fact-finder undermines the very purpose of our justice system – to convict the guilty and free the innocent. *See United States*

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[5] Mr. Cunningham tried to prove his innocence by testifying in his own defense and calling two character witnesses. His uncorroborated testimony was not enough to extricate him from all the charges: he was acquitted of two counts but convicted of two counts.

[6] There is a qualitative difference between newly discovered evidence that tends to exculpate a defendant and newly discovered evidence, like Lemieux's testimony in this case, that, if credited by the jury, establishes a defendant's actual innocence.

v. Nobles, 422 U.S. 225, 230 (1975). This petition presents an appropriate case for this Court to resolve an inter-circuit conflict over a legal issue that affects the fundamental fairness of our criminal process.

CONCLUSION

For the reasons stated above, CHARLES CUNNINGHAM respectfully petitions this Court for a writ of certiorari.

Respectfully submitted,

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APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5242
Non-Argument Calendar

D. C. Docket No. 90-007-CR-LCN

(Filed April 8, 1998)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES CUNNINGHAM,
a.k.a. "Chuck",

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(April 8, 1998)

Before COX, BLACK and HULL, Circuit Judges.

PER CURIAM:

Charles Cunningham was convicted, along with other defendants, for conspiracy to import cocaine (Count I) and attempting to import cocaine (Count V). We affirmed his conviction and sentence. *United States v. Vega-Fleites*, Case No. 93-4013 (11th Cir. June 19, 1996).

Cunningham filed a motion for a new trial grounded upon the assertion that David Lemieux, a named defendant and coconspirator, will provide testimony that will exonerate Cunningham. The district court denied Cunningham's motion, and thereafter denied a motion seeking reconsideration of the order denying the motion. Cunningham appeals.

Cunningham presents two issues on this appeal. First, he contends that the district court abused its discretion in denying the motion for a new trial. Second, he contends that it was an abuse of discretion to deny the motion without affording Cunningham an opportunity to depose Lemieux and present his testimony by deposition at an evidentiary hearing.

The district court concluded that this testimony, while it may be "newly available," is not "newly discovered." Additionally, the court noted that an evidentiary hearing was not warranted at the time because Lemieux was serving a prison sentence outside the subpoena power of the court.

The decision of the trial court on a motion for a new trial like this one is due special deference, *Weiss v. United States*, 122 F.2d 675, 691 (5th Cir. 1941), and we find no abuse of discretion in the denial of the motion or Cunningham's request to reconsider the denial. Similarly, we find no abuse of discretion in the denial of Cunningham's request to depose Lemieux given the district court's conclusion that the testimony in question was not "newly discovered."

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 90-007-CR-NESBITT

UNITED STATES
OF AMERICA,

vs.

CHARLES
CUNNINGHAM,

Defendant.

_____/

ORDER DENYING MOTION FOR NEW TRIAL

(Filed May 27, 1997)

This cause came before the Court upon Defendant's Motion for a New Trial flied [sic] October 11, 1997. Defendant Charles Cunningham's request for a new trial is based upon the affidavit and proposed testimony of David Lemieux one of Cunningham's co-Defendants who was never taken into custody and eventually fled to England. While in England, Lemieux committed several crimes and is now serving a 16 year prison sentence. Despite several efforts by the Unites [sic] States to attain jurisdiction over Lemieux and seek his deportation to the United States, Lemieux will remain in England until he has at least served out his prison term. Defendant Cunningham claims that Lemieux's testimony, not discovered at the time of the trial is sufficient to require a new trial to hear this matter before a jury.

In order to grant a motion for a new trial based upon newly discovered evidence, the Court must find that the following five part test is satisfied:

> (1) the evidence must be discovered after trial; (2) the movant must show due diligence to discover the evidence; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material to issues before the court; and (5) the evidence must be of such a nature that a new trial would probably produce a new result.

United States v. Gates, 10 F.3d 765, 767 (11th Cir. 1993) (citation omitted). "The failure to satisfy any one of these elements is fatal to a motion for new trial." *United States v. Lee*, 68 F.3d 1267, 1274 (11th Cir. 1995) (citation omitted).

Cunningham argues that the proposed testimony of David Lemieux is "newly discovered" because Lemieux was outside the jurisdiction of this Court at the time of trial, but has now agreed to submit an affidavit in Cunningham's behalf. However, the general rule "is that th[e] requirement [that evidence have been discovered since trial] is not met simply by offering the post-trial testimony of a co-conspirator who refused to testify at trial." *United States v. Dale*, 991 F.2d 810, 838-39 (D.C. Cir.), *cert. denied*, 510 U.S. 906, 114 S.Ct. 286 (1993) and *cert. denied*, 510 U.S. 1030, 114 S.Ct. 650 (1993) (citations omitted). Thus, Cunningham must direct the Court to other factors which support a finding that Lemieux's testimony is newly discovered.

In support of his Motion, Cunningham relies upon *United States v. Gates*, 10 F.3d 765 (11th Cir. 1993), *vacated in part on other grounds*, 20 F.3d 1550 (11th Cir. 1994). In *Gates*, the defendant, Gates, and his co-defendant, James, were tried and convicted of several bank robberies. Gates

testified at trial, but James invoked his Fifth Amendment rights. After trial, James provided an affidavit which "would exculpate [Gates] and name others as the co-participants" in the robberies. *Id.* at 767. Gates moved for a new trial, alleging that James's affidavit was newly discovered evidence.

Cunningham correctly points out that in considering whether there was evidence tending to show that Lemieux's affidavit was newly discovered evidence, the Eleventh Circuit noted that Gates's motion for new trial "tend[ed] to show that he did not discover until after trial that [the co-defendant] would exculpate him and name others as the co-participants" in the bank robberies. *Id.* at 767. Cunningham asks the Court to interpret the Eleventh Circuit's opinion in Gates as a suggestion that a co-defendant's post-trial testimony is "newly discovered" any time the movant did not discover, until after trial, that the co-defendant would provide testimony exculpating the movant.

However, such an interpretation is inconsistent with all published opinions of courts which have considered this issue, and with the Eleventh Circuit's admonition that a trial court must "view . . . with care" post-trial exculpatory statements given by a co-defendant. *Id.* at 768. Additionally, questions as to whether a co-defendant's post-trial testimony is newly discovered are fact-specific, *see, e.g., . . . , United States v, DiBernardo,* 880 F.2d 1216, 1225 (11th Cir. 1989), and this case is factually distinguishable from Gates. In *Gates,* the testimony contained in James's affidavit related to a theory which defendant Gates attempted to present at trial, but for which Gates could produce no evidence. Therefore, the

Eleventh Circuit could not, based solely upon James's affidavit, conclude that the evidence was not newly discovered.

Specifically, despite the fact that Gates testified at trial, the district court did not allow Gates

> to air . . . the precise issue raised by James's affidavit, i.e., whether he was James's partner and the identity of others as possibly the true partners. Gates attempted to introduce evidence arguably tending to show that in other robberies James had used persons other than Gates as his "floor men," arguably leading to an inference that some one or more of these prior participants mights [sic] have been James's co-actors in the robberies for which Gates was charged.

Id. at 768. James's affidavit provided the first piece of evidence tending to support Gates's theory that in previous robberies, James had used other "floor men," and that James might have used the same "floor men" in the robberies for which Gates was convicted. In such circumstances, depending upon what other evidence Gates presented to the district court on remand, it is possible that the district court could conclude that James's affidavit was newly discovered evidence.

In *United States v. Metz*, 652 F.2d 478 (5th Cir. 1981),[1] the appellant and a co-defendant had refused to testify at

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[1] Decisions of the former Fifth Circuit rendered prior to October 1, 1981, are binding upon district courts sitting in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

trial, and both were convicted. After trial, the co-defendant provided an affidavit which would exculpate the appellant. The former Fifth Circuit affirmed the district court's denial of the appellant's motion for a new trial based upon newly discovered evidence. The Fifth Circuit held:

> Clearly, this evidence cannot be considered "newly discovered." Even though [the co-defendant] may have been unavailable to testify at their joint trial because he invoked the Fifth Amendment, [the appellant] himself was not precluded from testifying on his own behalf that he (I) knew nothing of the conspiracy, (ii) was unaware of the presence of the cocaine in his residence, and (iii) was not at his residence . . . at the time of [the co-defendant's] visits.

Id. at 480.

Even if Cunningham could show circumstances similar to the ones presented in *Gates*, the Eleventh Circuit "d[id] not suggest or hint that Gates's motion should be granted." *Gates*, 10 F.3d at 768. Instead, the Eleventh Circuit merely concluded that the district court could not deny that motion "without a hearing to explore further and determine whether it has merit . . . ," *id.*, and in fact cautioned "that post-trial exculpatory statements given by a convicted co-defendant must be viewed with care." *Id.*

Unfortunately, an evidentiary hearing on this matter is premature. Lemieux is currently serving a prison sentence outside the subpoena power of this Court and will not be available for the next 16 years. A hearing on this matter without the [sic] Lemieux being available to testify

to the underlying claims under cross examination and to his unavailability at trial would be pointless. Until Lemieux has returned to the jurisdiction of this Court, or further evidence is presented by Cunningham to support Lemieux's testimony and the failure to raise this testimony at the time of trial, a hearing is not warranted.

Additionally, if Cunningham is actually innocent, then Cunningham certainly knew, even before trial, that Lemieux could testify that he knew of no facts which would demonstrate that Cunningham was involved in the conspiracy or drug offenses. Lemieux was simply unavailable to testify because he invoked he was hiding from authorities. Lemieux's present willingness to provide an affidavit only provides a newly available means through which Cunningham can present that evidence. *See, e.g., United States v. DiBernardo*, 880 F.2d 1216, 1225 (11th Cir. 1989) ("In both *Ledet* and *Newsom*, motions for new trials were granted which raised a co-defendant's exculpatory testimony as newly discovered evidence. . . . [I]n *United States v. Metz, supra*, we limited Ledet and *Newsom* to their facts and rejected the idea that newly available evidence is synonymous with newly discovered evidence on a Rule 33 motion."); *United States v. Dale*, 991 F.2d 810, 838-39 (D.C. Cir.), *cert. denied*, 510 U.S. 906, 114 S.Ct. 286 (1993) and *cert. denied*, 510 U.S. 1030, 114 S.Ct. 650 (1993) (citations omitted) ("the unanimous view of the circuits that have considered the question is that th[e] requirement [that evidence have been discovered since trial] is not met simply by offering the post-trial testimony of a co-conspirator who refused to testify at trial."); *United States v. Jacobs*, 475 F.2d 270, 286 n.33 (2d Cir.), *cert. denied sub nom. Lavelle v. United States*, 414 U.S. 821, 94

S.Ct. 116 (1973) ("[A] court must exercise great caution in considering evidence to be 'newly discovered' when it existed all along and was unavailable only because a co-defendant, since convicted, had availed himself of his privilege not to testify. This is so even if, as alleged, counsel for the co-defendant making a post-trial affidavit exculpating the movant had not allowed the affiant to be interviewed prior to trial."); *United States v. Offutt*, 736 F.2d 1199, 1202 (8th Cir. 1984) (citation omitted) (" 'when a defendant who has chosen not to testify subsequently comes forward to offer testimony exculpating a codefendant, the evidence is not 'newly discovered.' ' "); *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir.), *cert. denied*, 560 U.S. 890, 113 S.Ct. 258 (1992) (citation omitted) ("The Ninth circuit has adopted the view that 'when a defendant who has chosen not to testify subsequently comes forward to offer testimony exculpating a codefendant, the evidence is not 'newly discovered.' ' "); *United States v. Lockett*, 919 F.2d 585, 591 (9th Cir. 1990) (such evidence is merely "newly available."); *United States v. Perez-Paredes*, 678 F. Supp. 259, 261 (S.D. Fla. 1988) (citations omitted) ("Courts addressing . . . exculpatory testimony of a co-defendant which was not elicited during trial but subsequently becomes available have generally held that it is not newly discovered evidence."); *United States v. Flynn*, 791 F. Supp. 133, 136 (M.D.N.C. 1992) ("Defendant surely knew that his co-defendants could testify about his involvement, if any, in the drug transaction. . . . Nevertheless, Defendant did not move for a severance. Therefore, the evidence is not newly discovered but only newly available."). *United States v. Castano*,

756 F. Supp. 820, 823 (S.D.N.Y. 1991) (co-defendant's testimony was at most "newly available" when defendant who unsuccessfully sought to interview co-defendant knew that co-defendant could testify that defendant was merely present at scene and had no involvement); *United States v. Persinger*, 587 F. Supp. 899, 901 (W.D. Pa. 1984); *United States v. Carlin*, 573 F. Supp. 44, 46 (N.D. Ga. 1983).

Accordingly, it is hereby

ORDERED AND ADJUDGED that Defendant Charles Cunningham's Motion for a New Trial is **DENIED WITHOUT PREJUDICE**.

DONE and ORDERED in Chambers, Miami, Florida, this day of May, 27day of May, 1997.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES
DISTRICT JUDGE

cc: Paul Pelletier, AUSA
Kieran P. Fallon, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 90-007-CR-NESBITT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES CUNNINGHAM,

Defendant.

_____/

ORDER

(Filed Jul. 2, 1997)

This cause comes before the Court upon Defendant's Renewed Motion for New Trial or, in the Alternative, to Reconsider filed June 6, 1997.

On May 29, 1997, the Court entered an Order denying Defendant's Motion for a New Trial. In the instant motion, Defendant requests the Court to reconsider its ruling on the ground that the Court did not consider the sworn interview of David Lemieux and that David Lemieux's supposed unavailability at the time of trial precluded his testimony. The Court declines to do so. "A motion for reconsideration should not be used as a vehicle to present authorities available at the time of the first decision or to reiterate arguments previously made." *Z.K. Marine, Inc. v. M/V Archigetis*, 808 F.Supp. 1561, 1563 (S.D.Fla. 1992). *See also, Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3rd Cir. 1985), *cert. denied*, 476 U.S. 1171 (1986).

Accordingly, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion for New Trial or, in the Alternative, to Reconsider filed June 6, 1997 is **DENIED**. It is further **ORDERED**

that in all proceedings before the undersigned District Judge, *all motions when filed shall be accompanied by stamped self addressed envelopes for each party entitled to notice,* as proscribed by Local Rule 7.1(A)(4).

DONE AND ORDERED, in chambers, Miami, Florida, this 1st day of July, 1997.

/s/ Lenore C. Nesbitt
LENORE C. NESBITT
UNITED STATES
DISTRICT JUDGE

cc:

Howard M. Srebnick, Esq.
Paul Pelleteir, Esq., AUSA
Kiernan P. Fallon, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5242

(Filed Aug. 03, 1998)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES CUNNINGHAM,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19___, _____F.2d_____).

Before: COX, BLACK, and HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E.R. Cox
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 90-007-Cr-Nesbitt

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHARLES CUNNINGHAM,

Defendant.

NOTICE OF FILING

(Filed Mar. 25, 1997)

Defendant CHARLES CUNNINGHAM, through counsel, files the original transcript of the sworn interview of David Lemieux in support of Defendant's Motion for a New Trial.

Respectfully submitted,

BLACK, SREBNICK
& KORNSPAN, P.A.
201 South Biscayne Boulevard
Suite 1300
Miami, Florida 33131
(305) 371-6421

By: /s/ Howard Srebnick
HOWARD M. SREBNICK
Attorney for
Charles Cunningham
Florida Bar No. 919063

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 3/25/97 a true and correct copy of the foregoing was mailed to: **Paul Pelletier, Esq.**, Assistant U.S. Attorney, 99 Northeast 4th Street, Miami, Florida 33132-2111 and **Kiernan P. Fallon, Esq.**, 2100 Coral Way, Suite 500, Miami, Florida 33145.

By: /s/ Howard Srebnick
HOWARD M. SREBNICK, ESQ.
Attorney for
Charles Cunningham

[p. 1] **TRANSCRIPT OF SWORN INTERVIEW OF DAVID LEMIEUX**

Mr. Petruzzi – Paul Petruzzi, Esq., of Black, Srebnick & Kornspan, P.A.

Mr. Bates – John Bates, of Batten International Security

Lemieux – David Lemieux, Witness

Mr. Petruzzi: Today's date is March 13, 1997, my name is Paul Petruzzi. I'm an attorney from Black, Srebnick & Kornspan in Miami. I'm here on behalf of Charles Cunningham. Here with me is – why don't I let everybody introduce themselves so that we can tell the difference in voices.

Mr. Bates: I'm John Bates, a private investigator.

Lemieux: David Lemieux, what am I?

Mr. Petruzzi: You're going to be –

Mr. Bates: The witness –

Mr. Petruzzi: You're the witness.

Mr. Bates: – how's that?

Mr. Petruzzi: Okay. David, please state your name and/or names that you are known by for the record.

Lemieux: David Michael Lemieux and Paul Jeffrey Carpenter.

Mr. Petruzzi: What's your date of birth?

Lemieux: Mine is 9/2/52.

Mr. Petruzzi: Okay. How tall are you and how much do you weigh?

Lemieux: Oh, about 5'9", 200.

Mr. Petruzzi: Where were you born?

Lemieux: Providence, Rhode Island.

Mr. Petruzzi: And you're a citizen of what country?

Lemieux: U.S.

Mr. Petruzzi: Okay, and do you have a prisoner identification number here?

Lemieux: Yeah, PT0031.

[p. 2] Mr. Petruzzi: Okay, and what is the name of this institution.

Lemieux: HMP Whitemore.

Mr. Petruzzi: Okay. Are you serving a sentence here in the U.K.?

Lemieux: Yes, 16 years.

Mr. Petruzzi: Sixteen years. And who is your attorney?

Lemieux: John Zanni is the solicitor over here and O'Donnell in the States.

Mr. Petruzzi: Have you conferred with Mr. Zanni before giving this interview?

Lemieux: Yes, I have.

Mr. Petruzzi: Okay. Are you aware that everything that you say here today has to be the truth?

Lemieux: Yes, I am.

Mr. Petruzzi: Have you discussed that with Mr. Zanni?

Lemieux: Um, Mr. Zanni wasn't too keen on me meeting with you all, but Mr. – I discussed it with Ed O'Donnell and he said it was okay, so –

Mr. Petruzzi: And has anybody forced you to make this –

Lemieux: No, no, none whatsoever.

Mr. Petruzzi: So you're doing this of your own free will?

Lemieux: Yes.

Mr. Petruzzi: Are you under the influence of any drugs or alcohol?

Lemieux: No sir.

Mr. Petruzzi: And, once again I'm going to ask you, are you going to be stating – what you're going to be stating today, is that going to be the truth as you know it and are you prepared to testify to what you're going to be stating today –

Lemieux: Yes.

Mr. Petruzzi: – in a court in the United States?

Lemieux: Yes.

Mr. Petruzzi: Subject to cross examination by a United States Attorney?

[p. 3] **Lemieux**: Yes.

Mr. Petruzzi: Okay. I'm going to go through a prepared list of questions for the record. You now have the list of questions in front of you and as we're going through each one of the questions, you're going to be writing the answers to those questions.

Lemieux: Okay.

Mr. Petruzzi: Are you the David Lemieux indicted in the case of *United States v. Lemieux*, case number 92-007, which is pending in the U.S. District Court for the Southern District of Florida?

Lemieux: Yes, I am.

Mr. Petruzzi: Are you also known by the name Paul Carpenter?

Lemieux: Yes, I am.

Mr. Petruzzi: Are you aware of the fact that you may be extradited to the United States to face trial, and in the event of conviction, you may be sentenced up to a term of life in prison?

Lemieux: Yes, I am.

Mr. Petruzzi: Do you understand that your responses to these questions will be filed in the U.S. District Court for the Southern District of Florida in support of a motion for new trial filed by Charles Cunningham and could be used against you as evidence by the United States government during trial or any other proceedings?

Lemieux: Yes.

Mr. Petruzzi: Do you understand that giving false responses to these interrogatories may subject you to prosecution for perjury in a U.S. court?

Lemieux: Yes.

Mr. Petruzzi: Are you prepared to testify truthfully under oath either in person or by way of deposition subject to cross-examination by a U.S. government attorney about Charles Cunningham's relationship to the allegations contained in the indictment?

[p. 4] **Lemieux**: Yes.

Mr. Petruzzi: Have you reviewed the indictment in *United States v. Lemieux*?

Lemieux: Um, partially.

Mr. Petruzzi: And who provided you with that indictment?

Lemieux: Uh, I was sent pieces of it when we were first arrested over here by an investigator back there and by my attorney over here, John Zanni.

Mr. Petruzzi: Nevertheless, you know what the charges are?

Lemieux: Yes.

Mr. Petruzzi: Have you also reviewed the trial transcript memorializing the testimony of James Richardson, David Shanley, and Charles Cunningham?

Lemieux: Yes, I saw most of it.

Mr. Petruzzi: Were you personally involved in the events events [sic] set forth in the indictment?

Lemieux: Yes.

Mr. Petruzzi: Were Richardson and Shanley working with you to import cocaine into the United States as generally alleged in the indictment and during trial?

Lemieux: Yes.

Mr. Petruzzi: Did you meet Charles Cunningham at Merlin's Lounge in 1979?

Lemieux: Yes, sir, about that.

Mr. Petruzzi: Did you and Charles Cunningham develop a friendship?

Lemieux: Yes, very close.

Mr. Petruzzi: Did you and Charles Cunningham often go fishing together?

Lemieux: Very often.

Mr. Petruzzi: Did you tell Charles Cunningham that your source of income stemmed from race horses and the ownership of a bar?

Lemieux: Yes.

Mr. Petruzzi: Did you deliberately maintain an appearance of legitimacy as a successful [p. 5] entrepreneur as a front for Cunningham and other persons?

Lemieux: Yes.

Mr. Petruzzi: Did you invite Cunningham on July 21, 1989, to look at a boat at the Moorings Marina?

Lemieux: Yes.

Mr. Petruzzi: Had you rented this boat docked at the Moorings Marina to take a trip to the Bahamas?

Lemieux: Um, no, I hadn't rented the boat. Shanley and Richardson had the boat and they were, they were using the boat. I was just going down to look at it.

Mr. Petruzzi: Okay. Did you invite Cunningham to see the boat because it was known to you that Cunningham was very knowledgeable as to boating?

For the record, I'm stopping the tape so that Mr. Lemieux can write answers.

Okay, we're starting back up and we're now on the next question. Again repeating it, did you invite Cunningham to see the boat because it was known to you that Cunningham was very knowledgeable as to boating?

Lemieux: Well, we, uh, Cunningham and I used to make a habit of going out to breakfast every Saturday morning, and I do believe this was a Saturday because he was off work and I had to go to the marina, so it was just part of our normal routine. We were going to go to breakfast and I just mentioned that I had to go down to this marina to look at this boat. So it was just part of our nor – , you know, Saturday routine where we'd go out and have a breakfast somewhere.

Mr. Petruzzi: Did you pick up and drive Cunningham to the Moorings Marina on July 21, 1989?

Lemieux: Yes.

Mr. Petruzzi: On the way to the marina, did you pull into the parking lot of a 7-11 convenience [p. 6]

store so that Richardson and Shanley could follow you in a separate vehicle?

Lemieux: Yes, I did.

Mr. Petruzzi: And was this after you had already had breakfast?

Lemieux: No, we hadn't had breakfast yet. 'Cause I told them we were going to go – I had to go to this marina first and then we'd go on to breakfast.

Mr. Petruzzi: To the best of your knowledge, did Cunningham know what you were doing or had Cunningham ever met either Richardson or Shanley before July 21, 1989?

Lemieux: No, he had not.

Mr. Petruzzi: Upon your arrival to the marina, did it begin to rain?

Lemieux: Yes, it did if I recall correctly.

Mr. Petruzzi: Did Richardson and Shanley park near your vehicle?

Lemieux: Yes, they did.

Mr. Petruzzi: Did you personally hand Shanley $5,000 in cash for expenses during the meeting at the Moorings Marina?

Lemieux: Yes, I definitely gave the money to Shanley.

Mr. Petruzzi: Did you ever witness Cunningham handle that money?

Lemieux: Cunningham never saw the money.

Mr. Petruzzi: Did you deliberately hand the money to Shanley in a manner such that Cunningham did not witness this exchange?

Lemieux: The money was in a brown paper bag, so it wasn't, it wasn't like it was standing out and I was waving hundred dollar bills around. It was in a brown bag and I discreetly pulled it out of the console and passed it to Shanley, yes.

Mr. Petruzzi: Did you tell Cunningham that the money handed to Shanley was for expenses related to the importation of drugs?

Lemieux: No, I did not. He didn't even know that I'd given money to Shanley.

[p. 7] Mr. Petruzzi: Was Cunningham inside your vehicle while you, Richardson, and Shanley met with the marina manager privately indoors?

Lemieux: I don't think we ever met with him indoors. We did meet with him outside, and Cunningham, yes, had returned to the vehicle because it was raining at that time.

Mr. Petruzzi: Was Cunningham privy to any of the marina discussions concerning the planned cocaine offload?

Lemieux: No he was not.

Mr. Petruzzi: Did you briefly introduce Cunningham as Chuck to Richardson and Shanley?

Lemieux: Yes, I believe so.

Mr. Petruzzi: Was the manager's name Brad?

Lemieux: Yes it was.

Mr. Petruzzi: Did your meeting of July 21, 1989, with Richardson, Shanley, and Brad at the marina last approximately five minutes?

Lemieux: Yes, as far as I recall it was no more than five minutes.

Mr. Petruzzi: Did you introduce Chuck Cunningham as the marina manager or the marina contact to either Richardson or Shanley?

Lemieux: No, definitely not.

Mr. Petruzzi: So if either Richardson or Shanley would state that Cunningham was the marina manager, they would be incorrect?

Lemieux: Yes, they'd definitely be incorrect because Chuck was never introduced as marina manager.

Mr. Petruzzi: So when Shanley testified at trial that you introduced Chuck as the marina manager contact, or the, I'm sorry, as the marina manager or the marina contact, was that tru – testimony truthful?

Lemieux: No.

Mr. Petruzzi: Did you deliberately exclude Cunningham from any and all drug-related discussions?

[p. 8] **Lemieux**: Yes I did.

Mr. Petruzzi: Did you deliberately refrain from any drug-related discussions in the presence of Charles Cunningham?

Lemieux: Yes, I refrained from any conversation about anything to do with drugs in front of Cunningham.

Mr. Petruzzi: Did you ever overhear Charles Cunningham discussing drug-related business?

Lemieux: No, never.

Mr. Petruzzi: Did Charles Cunningham know anything about – to the best of your knowledge?

Lemieux: To the best of my knowledge, no, he had no clue.

Mr. Petruzzi: Did you invite Cunningham to take a fishing trip to the Bahamas on or about July 21, 1989?

Lemieux: Yes I did.

Mr. Petruzzi: Did you lure Cunningham to take the trip by referring to a fishing hot spot where you would go?

Lemieux: Well, yeah, basically, uh, the Bahamas is the hot spot, and I told him we could – we would do Yellowtailing and Grouper and then go for Dolphin, yes, I enticed him by the lure of all kinds of fishing.

Mr. Petruzzi: Did you offer Cunningham an expense paid trip provided that he assist with the boat and the fishing equipment?

Lemieux: Yes.

Mr. Petruzzi: Did you know Cunningham to be a skilled fisherman and boatmate?

Lemieux: Yes, he was very skilled.

Mr. Petruzzi: Did you and Cunningham leave Miami for the Bahamas on or about July 25, 1989 aboard the Dixie, a 53-foot Hatteras?

Lemieux: Yes.

Mr. Petruzzi: Did you dock the Dixie in the Chub Cay area?

[p. 9] **Lemieux**: Um, no, originally we went to Freeport, Grand Bahama, with the Dixie.

Mr. Petruzzi: Was the vessel JJ Lorick docked miles away?

Lemieux: Um, yeah, it – this is the – the beginning of the trip, we were in one marina in Freeport, and the JJ Lorick, to my knowledge, was in a different marina in Freeport. I hadn't even seen the JJ Lorick on the trip yet, so this was, uh, these questions refer to later, I do believe, after we'd already arrived in Freeport and been there a day or two.

Mr. Petruzzi: Okay, well if we could jump ahead in time, then, did there come a time when you docked the Dixie at the Chub Cay area?

Lemieux: Yes. It was just south of Little Whale Cay, I do believe.

Mr. Petruzzi: Okay. Was the vessel – at that time, was the vessel JJ Lorick docked miles away?

Lemieux: Yes, it was approximately – without seeing the chart I'd have to say eight to ten miles and with an island or two in between us, yes.

Mr. Petruzzi: Did Cunningham ever attend any meetings aboard the Lorick vessel?

Lemieux: No, he did not.

Mr. Petruzzi: With respect to the cocaine smuggling operation of July 1989, alleged in the indictment, did you rely upon the use of unwitting parties to provide a cover while you were at sea?

Lemieux: No I did not.

Mr. Petruzzi: With respect to Charles Cunningham, did you use him as an unwitting party?

Lemieux: Well, see – nothing was going to happen on this expedition. That's why I invited Mr. Cunningham to come along. I wanted him to come along because the Dixie was a new vessel and I knew that he could help me with any mechanical problems, et cetera, et cetera. Mr. Cunningham is very smart electrically. He knows a lot about mechanics, and what nobody knows is that nothing was gonna' happen on this – this was all a dry run that Alex Decubis has planned because he was tired of [p. 10] folks not showing up to collect the stuff. So what had happened was this, this outing, everybody was told it was gonna' happen a certain night.

Mr. Petruzzi: Who was everybody?

Lemieux: The boats that were supposed to be there to collect the cocaine.

Mr. Petruzzi: For the record, I've just turned the tape over. I'll repeat the last question. But not Charles Cunningham?

Lemieux: No, Charles Cunningham had nothing to do with any of this. The boats that were supposed to come were all from different groups. I mean, I didn't even know the people, just the number of boats that were supposed to be there. Well, Alex was sick of people not showing up when they were supposed to, so he told everybody that it was gonna' happen this certain night, and I was the only one that knew that it wasn't gonna' happen. But I was gonna' go to the scene, find out who was there, if everybody had showed up, I would tell them to wait and then Alex was gonna' have the boat, the freighter come the next night. But when I went and inspected the scene, there was only three or four boats there, and there were supposed to be eight or ten, so I telephoned Alex and he called it off. So, there was – he called it off for the next night even. So what had happened was the dry – this was a dry run – nobody knew about it except Alex and I. We were just making sure everybody got there so the stuff would be distributed and not have to be left in the hands of people in the islands where he's had stuff go missing and had to pay extra money to store it. So, this was all a dry run, and not enough boats showed up like Alex guessed would happen, so he called the whole thing off after the next day when nobody showed up again.

Mr. Petruzzi: Okay. I'm gonna' go back to some of the questions.

Lemieux: [Chuckles]

Mr. Petruzzi: Let's see, what were we on?

[p. 11] Mr. Bates: 46, 47.

Mr. Petruzzi: Yeah, okay. Uh, did you establish a specific front for each vessel involved in the operation?

Lemieux: Uh, no, that wasn't what I was intended to do. I was just there to count and see who got what and make a list for Alex of where everything went. As far as making fronts for each vessel, I would think they did that on their own. I mean, that was up to them to decide how they were gonna' take care of their business once they received their packages.

Mr. Petruzzi: Okay. To your knowledge was the Lorick supposed to appear as a vessel with couples on vacation?

Lemieux: Yes, I do remember discussing that with Shanley.

Mr. Petruzzi: How about the Dixie? Was that supposed to be a pleasure craft on a fishing trip?

Lemieux: Yes.

Mr. Petruzzi: At some point were there two women aboard the Lorick as unwitting decoys?

Lemieux: Um, as far as I know, uh, they knew what was going on but that was just hearsay, so, yes, I guess they were put on for decoys, yes.

Mr. Petruzzi: Uh, one of these women – was one of these women brought to the Bahamas from the U.S. named Lynn Gillen?

Lemieux: Yes.

Mr. Petruzzi: Did there come a time when you specifically asked Cunningham to pay Lynn Gillen's

financial obligation at the Probation Office so that she could travel back to the Bahamas to provide you with companionship?

Lemieux: Yes.

Mr. Petruzzi: Did you choose Charles Cunningham as an unwitting decoy on the Dixie?

Lemieux: Well, going back to what I just told you before, no, I chose Charles Cunningham because he was a good friend and very knowledgeable, and I didn't think there was [p. 12] any way he could get in trouble because nothing was gonna' happen that night. It was all a decoy to make sure everybody got there. And so that's why I asked Charles Cunningham, because he's a good friend and we did go fishing afterwards and, uh, we did fish that night and I wanted him along because I didn't think there was any way he could get in trouble, because it was all a smokescreen that night.

Mr. Petruzzi: Did you tell Cunningham at any time that he was taking a trip to the Bahamas to provide cover for –

Lemieux: No.

Mr. Petruzzi: – cocaine smuggling operation?

Lemieux: No I did not.

Mr. Petruzzi: Did you tell Cunningham that he was taking a trip to the Bahamas to provide assistance in the importation of cocaine that you had planned?

Lemieux: No, definitely not.

Mr. Petruzzi: Did you trust Charles Cunningham?

Lemieux: Yes I did, very much. We were good friends.

Mr. Petruzzi: Did you decide to have Charles Cunningham come along as an unwitting decoy because you felt that Cunningham would not compromise your plan?

Lemieux: No, it's like I said it before, I had him along because he's very knowledgeable and I didn't think there was any way he could get in any kind of trouble because nothing was gonna' happen.

Mr. Petruzzi: Okay. Did you plan to meet other vessels including the Lorick late at night for the purpose of coordinating an offload of cocaine? I think this will go back to the other –

Lemieux: Yes, it sure does. I mean, uh, we were gonna' meet the vessels, but definitely not that night because it was, uh, Alex, like I said had had problems with boats not showing up and he wanted to make sure everybody was there before he brought the [p. 13] freighter in, so, it was, uh, it was not gonna' happen that night.

Mr. Petruzzi: Regardless of that, that night was the Dixie anchored several miles away from the offload activity?

Lemieux: More than several miles away. Like I said –

Mr. Bates: [unintelligible]

Lemieux: Well, let's say eight to ten to be safe, but it could even be more than ten, I'd really need to look at the chart again, but I definitely put an island or two in between us just to – so the Dixie was no wheres near anything that was going on.

Mr. Petruzzi: Okay. Moving on, did you engage in late night runs aboard a Boston Whaler to meet other vessels docked miles away?

Lemieux: Yes.

Mr. Petruzzi: Would that be docked or anchored?

Lemieux: They were anchored.

Mr. Petruzzi: Okay. Did you tell Cunningham about the late night runs aboard a Boston Whaler and that these actions related to the cocaine smuggling plan?

Lemieux: No. Cunningham had no knowledge of it.

Mr. Petruzzi: To your knowledge, was Cunningham asleep after dinner the night of the planned cocaine-related activities?

Lemieux: Yes, Mr. Cunningham drank a few beers that day and he was sound asleep by seven o'clock, I would say.

Mr. Petruzzi: Did Cunningham participate in any of the cocaine-related activities?

Lemieux: No he did not.

Mr. Petruzzi: Did you discuss any of your plans regarding the offload of cocaine with Cunningham?

Lemieux: No, never.

Mr. Petruzzi: Did you inform Cunningham that other persons or vessels were involved in the [p. 14] planned offload of cocaine?

Lemieux: No, never.

Mr. Petruzzi: Did you specifically instruct other participants in the offload venture – the cocaine smuggling – to discuss any facet of the plan in the presence of Cunningham?

Lemieux: Um, not exactly in those words, but they all knew not to talk about anything in front of anybody. I mean I would pull them to one side and say, look, there's people on my boat that don't know what's going on so please, when you've got something to ask me, if you ever come around, make sure you take me to the side. They said okay.

Mr. Petruzzi: Presumably because you knew that Cunningham knew nothing about it?

Lemieux: Exactly.

Mr. Petruzzi: Did you tell Cunningham that you expected him to help with the boat and the fishing gear in exchange for the expense paid trip?

Lemieux: Yes, that was pretty much understood that I, you know, whenever we fished together, I always made him work. He, he'd have to do all the rigging of the baits and this and that because he's the best at it.

Mr. Petruzzi: But certainly nothing to do with cocaine?

Lemieux: No, no.

Mr. Petruzzi: Once the Dixie and its guests went fishing, did Cunningham tell you that he had to return to Miami because his vacation leave was over?

Lemieux: Yes, he said he only had a few days' leave, he had to be getting back.

Mr. Petruzzi: Some three weeks or so after the, after this aborted offload I guess is what I'm going to be referring to it, were you informed that the Dixie was sinking at dock in the Lucaya Marina located in the Bahamas?

Lemieux: Yes.

Mr. Petruzzi: At that time did you ask Cunningham to accompany you to the Bahamas in order [p. 15] to assist you in repairing the vessel?

Lemieux: Yes I did.

Mr. Petruzzi: Did you and Cunningham return on the same day?

Lemieux: Yes we did.

Mr. Petruzzi: Did you or anyone tell Cunningham that these repairs were part of a plan to smuggle drugs into the United States?

Lemieux: No.

Mr. Petruzzi: Now, at some point, did you tell Cunningham that you wanted to borrow his telephone calling card so that you could call a girlfriend without your wife seeing copies of the long distance toll charges?

Lemieux: Yes, I had asked him about – I used to carry a lot of quarters around, and I've been known to fool around a tad, so, it was out of convenience I asked him if he minded if I used his calling card so any of the numbers of my girlfriends wouldn't show up on my bill at home and I'd get questioned by my wife. And, uh, he would just – he said sure, no problem, and when the bill'd come, I'd pay it, so it was just as simple as that.

Mr. Petruzzi: One friend to another.

Lemieux: Exactly.

Mr. Petruzzi: Did you tell Cunningham that you intended to use the calling card to facilitate your cocaine smuggling activities?

Lemieux: No I did not.

Mr. Petruzzi: However, did you use Cunningham's calling card number to facilitate your cocaine smuggling activities?

Lemieux: No I did not. I might have called Alex or a few people, but never was anything discussed about that – I mean, it wasn't the specific reason I had the calling card. I had it to call girls and stuff, and uh, if I did call Alex or somebody a few times, I [p. 16] might have done that, but to Cunningham's knowledge, I was just using it because he knew I was a bit of a whore.

Mr. Petruzzi: Did you also allow other people, associates in the cocaine importation venture, to use the calling card number without Cunningham's knowledge?

Lemieux: No I did not.

Mr. Petruzzi: Are you sure about that?

Lemieux: To my knowledge, no I did not. I mean, I might have used the card with somebody standing there with me, or you know, if, if I did, if it was anybody, I might have given the number to Alex to let him use. You know it's hard for me to say, it's been a while and, you know, nobody that I know of specifically took his number and said okay, we're gonna' use this all the time, let's –

Mr. Petruzzi: Okay. Did you reimburse Cunningham for the use of his calling card number?

Lemieux: Yes. When he'd get the bill, I'd just, I'd pay him for it.

Mr. Petruzzi: Well, at least what you used –

Lemieux: Exactly.

Mr. Petruzzi: – on it.

Lemieux: I don't believe he paid for long distance and stuff anyway being a Southern Bell employee, I'm not sure of that fact, but yes, I'd pay what he told me I owed.

Mr. Petruzzi: Did you also have access to the telephone inside Cunningham's home?

Lemieux: Um, –

Mr. Petruzzi: In other words, did you use the phone in his home?

Lemieux: Whew, yes, I have before. I couldn't ever tell you who I called from there, but, you know, I

mean, we were good friends and I'd been in his house, he'd been in my house, and sure I've made phone calls from there.

Mr. Petruzzi: To the best of your knowledge, could you have used that phone to conduct conversations related to illegal activities or at least called persons that were involved [p. 17] in illegal activities?

Lemieux: It's a possibility, yes. I don't remember any one incident where, you know, I did do that, and if I did, I'd probably just call them and say I'll call you back, I'm gonna' run out to a pay phone or something, but –

Mr. Petruzzi: Nevertheless –

Lemieux: I might have done it, sure.

Mr. Petruzzi: Then it was probably likely to have occurred?

Lemieux: Oh, yeah, it could have, sure.

Mr. Petruzzi: Now, did you ever [sic] any of these conversations in Cunningham's presence?

Lemieux: No, never.

Mr. Petruzzi: Did you ever tell Cunningham that you intended to use his home telephone for the purpose of facilitating your cocaine smuggling activities?

Lemieux: No, definitely not.

Mr. Petruzzi: To the best of your knowledge, did you call a criminal associate, I apologize for the

wording of the questions, by the name of James Cavanagh from Cunningham's home telephone on July 21, 1989, the day of the Moorings Marina meeting?

Lemieux: Whew, to my knowledge, I mean, it's a good possibility I did, because, you know, I talked to Mr. Cavanagh now and then, but as far as remembering that I made the call on that day, no, I couldn't swear to that, but it's a good possibility I might have.

Mr. Petruzzi: And Cavanagh was involved in the cocaine smuggling activities, uh –

Lemieux: Uh –

Mr. Petruzzi: – to the best of your knowledge if you want to answer that question. If you don't want to answer that question, you're free not to, but –

Lemieux: Well, I don't think that has anything to do with this particular events because –

Mr. Petruzzi: Okay.

Lemieux: – if he did, Mr. Cunningham would surely have no knowledge of it.

[p. 18] Mr. Petruzzi: Okay, fair enough. Did you use Cunningham's calling card to contact your contact at the Moorings Marina in the Bahamas – from the Bahamas?

Lemieux: Let me get this straight, did you use Cunningham's – uh, a good possibility, yes.

Mr. Petruzzi: Did you eventually inform Cunningham that you provided his calling card number to others?

Lemieux: I don't re –

Mr. Petruzzi: Okay, we're uh, I just had to switch tapes, and we're now on tape number two, side one, and I'll repeat the question. Did you use Cunningham's calling card number to call your contact at the Moorings Marina from the Bahamas?

Lemieux: A good possibility, yes.

Mr. Petruzzi: Did you eventually inform Cunningham that you provided his calling card number to others?

Lemieux: Offhand I don't remember that, but it's, it's a good possibility if I had let Alex make a few calls or something that I could have told him, yes.

Mr. Petruzzi: Specifically do you remember telling Cunningham that you allowed a person named Tommy O'Donnell to use his calling card number?

Lemieux: Yes, now I do, I do recall that, because Tommy didn't have a calling card of his own, and I did let him, yes.

Mr. Petruzzi: Nevertheless, you do maintain that you did not tell Cunningham that you and your cocaine smuggling associates used his calling card number to further your illegal activities?

Lemieux: No, we did not.

Mr. Petruzzi: In other words, you did not tell Cunningham?

Lemieux: No.

Mr. Petruzzi: Okay. Did there come a time during December 1989, that you belatedly told Cunningham that you were involved in cocaine importation into the United States?

[p. 19] **Lemieux**: Yes.

Mr. Petruzzi: Was this the first time that you disclosed to Cunningham your involvement in the cocaine smuggling operation alleged in the Indictment?

Lemieux: Yes.

Mr. Petruzzi: Now, did you inform Cunningham during an encounter in December of 1989, that you were leaving the United States due to your expectation of a federal indictment for your cocaine importation activities?

Lemieux: Yes.

Mr. Petruzzi: Did you also advise Cunningham at that time of your concern that he might also face charges merely due to his presence aboard the Dixie during the attempted cocaine offload which took place in July of 1989?

Lemieux: Yes.

Mr. Petruzzi: Did you also voice your concern to Cunningham that he might face charges merely because of his association with you?

Lemieux: Yes I did.

Mr. Petruzzi: Did Cunningham react angrily as he realized that you had duped him all along and that he might face charges notwithstanding his innocence?

Lemieux: He was quite upset, yes.

Mr. Petruzzi: How do you feel about that?

Lemieux: Hh, uh, very bad. It's, you know, heavy guilt that I've been living with for a long time.

Mr. Petruzzi: Are you still willing to testify truthfully, as set forth above, and subject yourself to cross-examination by a U.S. government attorney?

Lemieux: Yes.

Mr. Petruzzi: And lastly, I guess, why are you coming forward with this information at this time?

Lemieux: Well, I wasn't available when the trial went on before to give this information, and [p. 20] I've been living with a lot of guilt since I've been in, and, uh, Chuck Cunningham had nothing to do with nothing, and he shouldn't be in jail, and that's why I'm coming forward.

Mr. Petruzzi: Okay. Thank you very much. I'm going to ask that you give us the copy of these questions that you've written on and, if you request, I can send you a copy of the transcript of the tape.

Lemieux: I would like that.

Mr. Petruzzi: And I'll just ask you to sign right there at the bottom at the end of the questions, yes we have [unintelligible] for you to sign.

Lemieux: It's been a while since I've signed David.

Mr. Petruzzi: Okay, and now asking that, uh, actually I'm now signing this as a witness.

Lemieux: I didn't get to write in all of the answers there because we got going pretty fast at some point, so I'm sure that with the transcripts of the tape –

Mr. Petruzzi: Right, exactly.

Lemieux: – you'll be able to fill it in I hope.

Mr. Petruzzi: For the record, there are a lot of blank spots here because I didn't want to stop the tape and write in all the answers. I'm also, for the record, I'm signing it as a notary public which I am, and dating this 13th of March, 1997. And I'm also asking John, if you would sign that right below my signature down there. For the record, John Bates just signed it, and we're all done. I'm stopping the tape.

Lemieux: Very good.

[END OF TAPE]

CERTIFICATE OF OATH

I, PAUL PETRUZZI, ESQ., a notary public authorized to administer oaths, certify under [p. 21] penalty of perjury that this transcript of an audio cassette recording constitutes a true, complete and accurate record of the statement provided by David Lemieux, under oath, in my presence in March, Cambridgeshire, U.K., on March 13, 1997.

WITNESS my hand and seal in the City of Miami, County of Dade, State of Florida, this 21st day of March, 1997.

OFFICIAL NOTARY SEAL
PAUL D PETRUZZI
NOTARY PUBLIC STATE
OF FLORIDA
COMMISSION NO. CC378534
MY COMMISSION EXP.
JUNE 5, 1999

/s/ Paul Petruzzi
PAUL PETRUZZI, ESQ

Supreme Court, U.S.
FILED
FEB 2 1999
CLERK

No. 98-724

In the Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES CUNNINGHAM, AKA "CHUCK", PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioner's motion for a new trial, where petitioner wished to introduce as "newly discovered evidence" the testimony of a co-conspirator who had been a fugitive at the time of petitioner's trial.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 141 F.3d 1189 (Table).

JURISDICTION

The court of appeals entered its judgment on April 8, 1998. A petition for rehearing was denied on August 3, 1998. Pet. App. 13-14. The petition for a writ of certiorari was filed on October 30, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner

was convicted of conspiracy to import cocaine and attempting to import cocaine, both in violation of 21 U.S.C. 963. He was sentenced to 300 months' imprisonment. The court of appeals affirmed. *United States* v. *Vega-Fleites*, 89 F.3d 853 (Table).[1] Following the Eleventh Circuit's decision, petitioner filed a motion for a new trial claiming that he had obtained newly discovered, exculpatory evidence. The district court denied the motion. Pet. App. 3-10. The court of appeals affirmed. *Id.* at 1- 2.

1. Petitioner participated as a planner, manager, and supervisor in a large-scale conspiracy to import cocaine into the United States. See App., *infra*, 8a. Between January and September 1989, the conspiracy transported thousands of kilograms of cocaine on a freighter from Columbia to the Bahamas, where the cocaine was loaded onto smaller boats for importation into the United States. *Id.* at 2a-3a. Petitioner belonged to a subgroup of the conspiracy, headed by David Lemieux, that was responsible for offloading the cocaine from ships near the Bahamas and bringing it into the United States. No. 97-5242 Gov't C.A. Br. 7.

The evidence at trial showed that, in July 1989, petitioner, along with Lemieux and two other co-conspirators, examined a marina in Miami, Florida, to determine its suitability for use as a site for them to offload cocaine that had been brought into the United States. No. 93-4013 Gov't C.A. Br. 7-8. On July 27, 1989, petitioner, Lemieux, and others were aboard a boat in the Bahamas waiting to offload the freighter, but they aborted the scheme when they detected law enforcement surveillance. *Id.* at 8-9. Telephone records also

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[1] The court of appeals' decision is reproduced in the appendix to this brief.

showed that petitioner made calls to four other members of the conspiracy, including Lemieux and one of the principal organizers of the conspiracy, during the time frame of the importation scheme. *Id.* at 14.

At the time of petitioner's trial in May 1992, Lemieux, who had been indicted with petitioner, remained a fugitive. Pet. App. 3. Although petitioner resided with Lemieux's mother throughout the trial, petitioner did not assert at any time that Lemieux would testify on his behalf, nor did he make any apparent effort to locate Lemieux or to seek the court's assistance in obtaining his testimony. No. 97-5242 Gov't C.A. Br. 32 n.12, 35-36. At trial, petitioner testified in his own defense. He claimed that Lemieux was a life-long friend with whom he had gone to the Bahamas to fish, and that he knew nothing of Lemieux's plan to import cocaine during the trip. *Id.* at 8. He attempted to explain the records showing telephone calls to co-conspirators by stating that he had lent his calling card to Lemieux. *Id.* at 8-9.

The jury found petitioner guilty of conspiracy to import cocaine and the attempted importation of cocaine, both in violation of 21 U.S.C. 963. At sentencing, the district court enhanced petitioner's sentence because it found that petitioner was a manager in the conspiracy. App., *infra*, 3a.

2. The court of appeals affirmed, concluding that the jury reasonably could have disbelieved petitioner's innocent explanation for his presence during the July 1989 offload attempt. App., *infra*, 7a (noting that petitioner "was present at times when it would be 'highly unlikely that conspirators attempting a . . . smuggling operation would have tolerated the *recurrent* presence of [] mere bystander[s]'") (quoting *United States* v. *Baptista-Rodriguez*, 17 F.3d 1354, 1374 (11th Cir.

1994)). The court of appeals further noted that "[t]he evidence shows that [petitioner] coordinated the offloading of the cocaine, exercised decision-making authority, and played a part in planning and controlling others involved in the conspiracy." App., *infra*, 8a.

3. In September 1992, three months after petitioner's trial, Lemieux was arrested by British authorities in England. Lemieux was subsequently convicted in England on other charges and sentenced to 16 years' imprisonment.[2] Pet. App. 3. In January 1994, petitioner's counsel "was made aware that David Lemieux had been arrested in Great Britain." Mot. for New Trial 3. Three years later, following the court of appeals' affirmance of petitioner's conviction and sentence, petitioner filed a motion for a new trial on the ground that Lemieux's availability to provide exculpatory testimony constituted newly discovered evidence. Pet. App. 3. In support of the motion, petitioner submitted a three-page affidavit in which Lemieux stated that petitioner had no knowledge of the illegal activities. See Aff. of D. Lemieux, attached to Mot. for New Trial. While his new trial motion was pending, petitioner submitted a transcript of a sworn interview with Lemieux taken on March 13, 1997. Pet. App. 17-45. During that interview, Lemieux repeated that his relationship with petitioner was purely personal, that petitioner was unaware that the purpose of the July 1989 trip was drug smuggling, and that petitioner had no involvement in Lemieux's drug smuggling activities. *Ibid.*

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[2] The United States sought Lemieux's deportation from England, but those efforts were unsuccessful, and Lemieux apparently will serve his sentence in England before there is a possibility of his being returned to the United States to stand trial. Pet. App. 3.

The district court denied the motion for a new trial. Pet. App. 3-10. The court invoked the "general rule" that "the post-trial testimony of a co-conspirator who refused to testify at trial" does not constitute "newly discovered evidence." *Id.* at 4. The court further explained that, "if [petitioner] is actually innocent, then [petitioner] certainly knew, even before trial, that Lemieux could testify that he knew of no facts which would demonstrate that [petitioner] was involved in the conspiracy or drug offenses. * * * Lemieux's present willingness to provide an affidavit only provides a newly available means through which [petitioner] can present that evidence." *Id.* at 8. The court further concluded that petitioner's motion identified no particular circumstances that would otherwise justify characterizing Lemieux's testimony as newly discovered. *Id.* at 5-7.

4. The court of appeals again affirmed. Pet. App. 1-2. The court noted that the district court's ruling was "due special deference" (*id.* at 2), and concluded that the district court had not abused its discretion in denying petitioner's new trial motion.

ARGUMENT

Petitioner argues (Pet. 7-14) that the court of appeals' determination that Lemieux's testimony was not "newly discovered evidence" conflicts with the rulings of other circuits. Because this case presents no such conflict, the court of appeals' ruling is correct, and further review would not alter the outcome of petitioner's case, this Court's review is not warranted.

1. Under Federal Rule of Criminal Procedure 33, a motion for a new trial must be filed within seven days of judgment, except for new trial motions "based on the ground of newly discovered evidence," which "may be

made only before or within two years after final judgment." Petitioner contends (Pet. 7-12) that review is warranted because the courts of appeals are in disagreement about whether evidence from witnesses who are known but "unavailable" at trial may constitute "newly discovered evidence" within the meaning of Rule 33. The decisions on which he relies do not assist him, however.

a. Under Rule 33, evidence of which the defendant knows, but cannot gain access to until after trial, is not "newly discovered." Consistent with that principle, a defendant who simply offers "the post-trial testimony of a co-conspirator who refused to testify at trial" does not meet the requirement of presenting newly discovered evidence. See, *e.g.*, *United States* v. *Dale*, 991 F.2d 819, 838-839 (D.C. Cir.) (describing that position as the "unanimous view of circuits that have considered the question"), cert. denied, 510 U.S. 906 (1993); see also, *e.g.*, *United States* v. *Freeman*, 77 F.3d 812, 817 (5th Cir. 1996) ("When a defendant is aware of a co-defendant's proposed testimony prior to trial, it cannot be deemed newly discovered under Rule 33 even if the co-defendant was unavailable."); *United States* v. *Glover*, 21 F.3d 133, 138 (6th Cir.) ("While Morgan's testimony may have been newly available, it was not in fact 'newly discovered evidence' within the meaning of Rule 33."), cert. denied, 513 U.S. 948 (1994); *United States* v. *Offutt*, 736 F.2d 1199, 1202 (8th Cir. 1984) ("[W]hen a defendant who has chosen not to testify subsequently comes forward to offer testimony exculpating a codefendant, the evidence is not 'newly discovered.'").

That principle applies here. Petitioner has not made, and could not make, any claim that he was unaware of Lemieux's potential testimony at the time of trial. To

the contrary, petitioner's assertion that he is innocent and had only a friendship with Lemieux presupposes that he believed at the time of trial that Lemieux would corroborate the nature of their friendship. The purported new evidence from Lemieux is, therefore, not "newly discovered."

There are sound reasons, moreover, to view such newly available evidence from a co-conspirator with considerable skepticism. While Lemieux has not yet been convicted, the 16 years that must elapse before he could face trial in the United States (while Lemieux completes his British prison term), the uncertainties that attend any international extradition effort, and the strength of the evidence already compiled against Lemieux, as displayed in petitioner's trial, leave Lemieux little to lose by attempting to help his co-conspirator. *Freeman*, 77 F.3d at 817 ("[I]t is not unusual for the obviously guilty defendant to try to assume the entire guilt," especially where he "had nothing to lose.").

b. Petitioner contends (Pet. 9) that the First and Sixth Circuits have ruled that a defendant's post-trial discovery of the location and availability of an exculpatory witness, including a co-defendant, is grounds for a new trial under Rule 33. The narrow holdings of the decisions on which petitioner relies afford no support for his claim that the district court in this case abused its discretion by denying his new trial motion.

In *United States* v. *Montilla-Rivera*, 115 F.3d 1060 (1997), the First Circuit held that the post-trial exculpatory testimony of the two co-defendants in that case *might* warrant a new trial. *Id.* at 1066-1067 (stating that, in contrast to other circuits, the First Circuit has no per se rule that formerly unavailable testimony cannot be "newly discovered evidence"). That decision, however, represented an extremely narrow view of

when such relief might be justified and, as such, is of no help to petitioner. The First Circuit specifically reconfirmed that proffers of "new" evidence by co-conspirators must be viewed "with great skepticism" and stated that it "share[d] the general skepticism concerning those statements" expressed by other courts. *Ibid.* The First Circuit simply concluded, based on the "unusual combination of circumstances" presented (*id.* at 1067) in that case, that the co-conspirator statements warranted a hearing at which the district court could decide whether to grant a new trial (*ibid.*).

No analogous unusual circumstances obtain here. To the contrary, in contrast to the case against the defendant in *Montilla-Rivera* (see 115 F.3d at 1067), the evidence against petitioner was strong and emanated from a variety of sources. See App., *infra*, 6a-8a; No. 93-4013 Gov't C.A. Br. 4-15, 33-36; No. 97-5242 Gov't C.A. Br. 7-9. Further, counsel for petitioner undertook no "significant efforts to procure [Lemieux's] testimony before his own conviction." *Montilla-Rivera*, 115 F.3d at 1067-1068. Accordingly, it is unlikely that the First Circuit would decide the present case any differently than did the Eleventh Circuit. In any event, the record-specific determination of whether the particular facts presented in this case are sufficient to dispel the skepticism that normally attaches to co-conspirator testimony does not present any legal issue that would merit this Court's review.[3]

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[3] As petitioner notes (Pet. 10), the First Circuit in *Montilla-Rivera* cited *United States* v. *Ouimette*, 798 F.2d 47 (2d Cir. 1986), cert. denied, 488 U.S. 863 (1988), as support for its general analysis, "[a]t least in the context of newly available evidence from one not a codefendant." 115 F.3d at 1066. *Ouimette* offers no help to petitioner. *Ouimette* involved an effort to introduce the previously unknown efforts of the police department to coerce an eye-

Nor is petitioner assisted (Pet. 10-12) by the Sixth Circuit's decision in *United States* v. *Garland*, 991 F.2d 328 (1993). In *Garland*, the defendant sought a new trial based on the judgment of a foreign court, which directly supported his claim of innocence. *Id.* at 330-332. That judgment, which provided "dramatic and probative" evidence supporting the defendant's claim, did not exist until after the defendant's trial "and thus could not have been 'discovered' earlier." *Id.* at 335. The court of appeals also held that the proposed testimony of a witness, who was not a co-defendant or co-conspirator, constituted newly discovered evidence because "it provide[d] a verifying link" between the defendant's defense and the intervening foreign judgment. *Ibid.* *Garland* thus gives no support to a claim that evidence may be newly discovered when it would come from a co-conspirator known to the defendant—as is confirmed by the Sixth Circuit's later decision rejecting such evidence in *Glover*, 21 F.3d at 138-139.[4]

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witness not to testify. 798 F.2d at 51. While the court of appeals agreed that the testimony of the eyewitness alone was not newly discovered, *ibid.*, the court ruled that the witness's testimony "concerning the pressure put on him by the Providence police to dissuade him from testifying for the defense is certainly new in the sense that it was discovered after trial." *Ibid.* The nature of Ouimette's claim, as well as the government's affirmative interference with the evidentiary process, thus sharply distinguish the Second Circuit's ruling from the decision at hand.

[4] Petitioner also suggests (Pet. 12) that the court of appeals' decision conflicts with the Fourth Circuit's unpublished decision in *United States* v. *Purnell*, No. 97-4057, 1998 WL 405942 (June 9, 1998). *Purnell*, however, involved the potentially exculpatory testimony of a witness, not a co-defendant. *Id.* at *3. Further, the court of appeals found that the defendant learned of the evidence only after trial and after diligently trying to uncover it in a timely fashion. *Id.* at *1, *3. In any event, the Fourth Circuit's decision in

2. Further review is also unwarranted because petitioner cannot satisfy the other criteria necessary to obtain a new trial under Rule 33. A ruling by this Court on whether Lemieux's testimony qualifies as newly discovered would, therefore, be unlikely to have any practical impact on petitioner's case.

When considering motions for new trials, courts generally require the defendant to show that the evidence (1) is newly discovered and was unknown at the time of trial; (2) is material, and is not merely cumulative or impeaching; (3) will probably produce an acquittal; and (4) could not have been uncovered earlier through the exercise of due diligence by the defendant. 3 Charles Alan Wright, *Federal Practice & Procedure: Criminal* § 557 (2d ed. 1982) (collecting cases); see also Pet. App. 4. Moreover, motions for new trials on the ground of newly discovered evidence are not favored and should be granted only with great caution. See *United States* v. *Johnson*, 327 U.S. 106, 111-112 (1946) (great deference accorded to district court's decision and review of affidavits proposing new evidence).[5] In addition to being not newly discovered, petitioner's proposed testimony fails each of the other prongs of the test for granting a new trial.

First, petitioner did not exercise due diligence to uncover the testimony earlier. Petitioner made no effort, before or during his trial, to notify the district court of the existence of potentially exculpatory testimony.

Purnell would not create a genuine inter-circuit conflict because the unpublished ruling has no precedential force. See 4th Cir. R. 36(a)-(c).

[5] See also *Glover*, 21 F.3d at 138; *United States* v. *Kamel*, 965 F.2d 484, 490 (7th Cir. 1992); *United States* v. *Kelley*, 929 F.2d 582, 586 (10th Cir.), cert. denied, 502 U.S. 926 (1991).

Although petitioner was living with Lemieux's mother throughout the trial, he does not claim that he made any effort to locate Lemieux or obtain his testimony for submission as evidence at the trial. He sought no continuance or subpoena from the court to assist him in locating or obtaining Lemieux's testimony in a timely fashion. Moreover, even when petitioner learned of Lemieux's presence in Great Britain, he delayed another three years—until after the court of appeals had rejected his direct appeal from the conviction—before notifying the court of Lemieux's availability and moving for a new trial. Petitioner thus has failed to show due diligence in pursuing Lemieux's testimony. See *United States* v. *Frye*, 548 F.2d 765, 769 n.6 (8th Cir. 1977).

Second, Lemieux's testimony would simply echo petitioner's own testimony before the jury. The cumulative protestations of innocence by co-conspirators do not constitute the type of evidence that should support the grant of a new trial.

Third, Lemieux's testimony would be unlikely to produce an acquittal. As noted, Lemieux's proposed testimony adds little substantively to petitioner's rendition of events, which the jury rejected. More importantly, Lemieux's statements contradict petitioner's testimony in important regards. Lemieux repeatedly refuses to adopt petitioner's contention (Pet. 4) that petitioner was brought along as an unwitting "decoy" to provide cover for the drug operation. See Pet. App. 29, 32, 33.

Lemieux also offers little support for petitioner's claim (Mot. for New Trial 18-19) that Lemieux, not petitioner, used petitioner's calling card and telephone to contact other members of the conspiracy. See Pet. App. 37-40 (Lemieux largely unable to recall using the card or phone for contacting drug-trafficking associates;

claims it was primarily used "to call girls and stuff," *id.* at 37).

Petitioner and Lemieux provide differing explanations for petitioner's presence with Lemieux, in July 1989, at the marina that was being inspected as a site for offloading cocaine. Petitioner claims that Lemieux "wanted his opinion about a boat he had purchased, for [petitioner] was very knowledgeable about boats." Mot. for New Trial 16. Lemieux, on the other hand, declined to adopt that explanation when he was interviewed by petitioner's counsel (Pet. App. 23) and claimed instead that he and petitioner were on their way to a regularly scheduled breakfast, when Lemieux advised petitioner that he had to go look at a boat first. *Ibid.*[6] The discrepancies between petitioner's and Lemieux's testimony make it unlikely that the additional testimony of a co-conspirator would cause the jury to resolve its credibility determination any differently in a new trial.

Finally, Lemieux's claim (Pet. App. 30, 32) that he brought petitioner aboard the boat in the Bahamas only because he knew that nothing more than a "dry run" of the offload was planned is flatly contradicted by the testimony of multiple witnesses at trial and the realities of drug trafficking (see No. 97-5242 Gov't C.A. Br. 39-40), and thus would be likely to undercut Lemieux's credibility rather than assist petitioner's defense.

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[6] Moreover, Lemieux's story itself is not consistent. His original affidavit made no mention of the breakfast meeting and, instead, concurred with petitioner that the purpose of the visit was to look at a boat. Similarly, his affidavit admitted to using petitioner's calling card to support his smuggling operation, while his lengthier statements during the interview with counsel evade such an acknowledgment. See Aff. 3, attached to Mot. for New Trial.

Because petitioner's new trial motion must be denied regardless of whether Lemieux's testimony constitutes newly discovered evidence, and because the holding below that Lemieux's testimony would not constitute such evidence conflicts with no other appellate decision, this Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1999

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-4013
Non-Argument Calendar
D. C. Docket No. 90-007-CR-NESBITT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANDRES VEGA-FLEITES, JOHN CLIFTON ANDERSON,
CHARLES CUNNINGHAM, A/K/A "CHUCK",
JAMES CAVANAGH, A/K/A "CAPPY", JUAN DEARMAS,
ORLANDO ROJAS-SANTANA,
DEFENDANTS-APPELLANTS

APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF
FLORIDA

[Filed June 19, 1996]

Before: EDMONDSON, COX, and BARKETT,
Circuit Judges.

PER CURIAM:

Andres Vega-Fleites, John Clifton Anderson, Charles Cunningham, James Cavanagh, Juan DeArmas, and Orlando Rojas-Santana (Appellants) appeal following their convictions and sentences for various offenses arising out of their involvement in a large cocaine importation conspiracy. After a jury trial, all the Appellants were convicted for conspiracy to import cocaine in violation of 21 U.S.C. § 963. In addition: all Appellants except for Anderson were convicted for attempting to import cocaine in violation of 21 U.S.C. § 963; Cavanagh and Anderson were convicted for possession with intent to distribute cocaine in violation of 21 U.S.C. § 841; and, Cavanagh was convicted for importation of cocaine in violation of 21 U.S.C. § 952. Anderson had pled guilty prior to trial to the offense of failure to comply with bond conditions in violation of 18 U.S.C. § 401(3) and failure to appear for trial in violation of 18 U.S.C. § 3146(a)(1).[1]

The alleged conspiracy's goal was the importation into South Florida of a large quantity of cocaine brought by the Danish freighter *M/V NERMA* from Colombia to the Bahamas. Alex Decubas, working with several other conspirators, organized several "sub-groups" responsible for receiving the cocaine from the *M/V NERMA* and offloading it when it arrived in South Florida. Decubas allegedly was an agent of the cocaine's owner, and he coordinated the delivery and distribution of the cocaine, both in the Bahamas and once it arrived in South Florida. On several occasions from January to

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[1] In addition to the six appellants, two other alleged conspirators, Rolando Garcia and Lynn Gillen, were tried. The jury acquitted Garcia on all counts, and it acquitted Gillen on a count of attempting to import cocaine. The jury reached no verdict on the conspiracy charge against Gillen.

September 1989,[2] the following basic routine occurred: the *M/V NERMA* arrived at a predetermined point in the Bahamas, where its crew transferred watertight bales of cocaine to a smaller lobster or shrimping boat. That vessel then dispersed the bales to several smaller, faster boats for transport to Florida. Once these boats arrived, several conspirators offloaded the cocaine and delivered it to locations in Miami or Palm Beach.

At sentencing, the trial court found that Cunningham and Cavanagh were managers in the conspiracy's hierarchy, and it concluded that Vega-Fleites, DeArmas, and Rojas-Santana were offloaders who were also involved in preparing and piloting the boats used in the importation scheme. Anderson was apparently involved with distribution in Miami; he was caught in a car packed with cocaine just unloaded from a boat used in the September importation.

On appeal, the Appellants contend that the trial court erred by denying their motions for acquittal based on their assertion that the government failed to prove the existence of one conspiracy rather than several independent conspiracies. Vega-Fleites and DeArmas also contend that the court should have granted their motions for severance or for a mistrial because of the prejudicial effect of the evidence introduced regarding conspiracies unrelated to them. In addition, Vega-Fleites, Cunningham, Rojas-Santana, DeArmas and Anderson contend that, assuming that there was a

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[2] The indictment alleges five different episodes which occurred pursuant to the overarching conspiracy: successfully completed importations in January, March, and June 1989; an attempted importation in July 1989 that was interrupted by U.S. law enforcement officers; and the September 1989 importation that led to the appellants' arrest.

single conspiracy, the trial court erred by denying their motions for acquittal because the evidence was insufficient to prove that they knowingly agreed to join and participate in it. Finally, Vega-Fleites and Cunningham challenge the trial court's determination at sentencing of their roles in the conspiracy.[3]

A. Existence of a single conspiracy

The Appellants' main argument is that the evidence does not support the existence of a single, overarching conspiracy, as the indictment alleges. They assert that even though similar procedures were used each time the *M/V NERMA* offloaded cocaine, they were carried out pursuant to several *independent* importation conspiracies coordinated by Alex Decubas. The Appellants argue that this variance between the conspiracy

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[3] DeArmas and Cavanagh also challenge their sentences. DeArmas argues that the trial court should have departed downward under U.S.S.G. § 3B1.2 because he was a minimal or minor participant in the conspiracy. But we do not address this issue because DeArmas failed to raise any such objection to his sentence in the trial court. Similarly, we do not address Cavanagh's argument that the trial court erred by enhancing his sentence under § 3B1.1 for his role as a manager or supervisor. Cavanagh has failed to provide a transcript of his sentencing hearing, *see* Fed. R. App. P. 10(b)(2), so he has forfeited this claim. *See, e.g., United States v. Fuentes*, 877 F.2d 895, 899 (11th Cir. 1989).

DeArmas separately contends that the trial court abused its discretion by admitting evidence under Fed. R. Evid. 404(b) of a prior drug conviction, and Cavanagh contends (and DeArmas adopts the argument) that two instances of prosecutorial misconduct during the trial violated the defendants' due process rights. These contentions are without merit and do not warrant further discussion. 11th Cir. R. 36-1.

charged in the indictment and the evidence offered at trial prejudiced their substantial rights. The government contends that the evidence was sufficient for a reasonable jury to conclude that the Appellants were involved in a single conspiracy, so that the court did not err in denying Appellants' motions for acquittal or severance.

"We may reverse a jury's finding that a single conspiracy existed only if the evidence, viewed in the light most favorable to the government, could not permit reasonable jurors to have found, beyond a reasonable doubt, that there was a single conspiracy." *United States v. Brito*, 721 F.2d 743, 747 (11th Cir. 1983). We consider three criteria in discerning whether the government has proven a single conspiracy or multiple, independent ones: (1) the existence of a common goal; (2) the nature of the scheme; and (3) the overlap of the participants in the dealings of the conspiracy. *United States v. Taylor*, 17 F.3d 333, 337 (11th Cir. 1994) (citations omitted). In the present case, the evidence introduced at trial fairly supports the jury's finding of a single conspiracy. There was a common goal: to import cocaine into the United States. *See United States v. Coy*, 19 F.3d 629, 633 (11th Cir. 1994) ("common goal" criterion assessed at high level of generality). The "basic means of implementing the importation objectives were consistent throughout," *United States v. Champion*, 813 F.2d 1154, 1166 (11th Cir. 1987), and the groups of importers and offloaders were coordinated by the same "key men" who directed the illegal activities, *see id.* at 1167; *see also Taylor*, 17 F.3d at 337 (no requirement that each conspirator participated in every transaction, knew all other conspirators, or knew details of each venture).

B. Vega-Fleites's and DeArmas's motions for severance or for a mistrial

Because there was sufficient evidence for a reasonable jury to find that there was a single conspiracy, the trial court did not abuse its discretion by denying Vega-Fleites's and DeArmas's motions for severance or, in the alternative, for a mistrial. Even if the evidence showed that multiple conspiracies existed, we may not reverse Vega-Fleites's and DeArmas's convictions "absent a showing that the variance between the indictment and the evidence adversely affected [their] substantial rights." *United States v. Cole*, 755 F.2d 748, 765 (11th Cir. 1985). In essence, the Appellants argue that the joint trial of so many defendants likely confused the jury into transferring culpability from some defendants to others. But two of the Appellants' co-defendants were acquitted, suggesting that the jury was not confused by the number of defendants at trial. Vega-Fleites and DeArmas have not shown any prejudicial variance between the indictment and the evidence. *Id.*

C. Sufficiency of evidence inculpating Vega-Fleites, Cunningham, Rojas-Santana, DeArmas and Anderson

Appellants Vega-Fleites, Cunningham, Rojas-Santana, DeArmas, and Anderson contend that the evidence introduced at trial was insufficient to prove beyond a reasonable doubt that they knowingly agreed to join and participate in the conspiracy alleged in the indictment. At trial, they asserted various explanations for their presence near the *M/V NERMA*, on the vessels involved in the importation scheme, and at the offload sites in South Florida. The government con-

tends that the jury was entitled to disbelieve these proffered versions of events and infer, based on other evidence introduced at trial, that the Appellants knowingly participated in the criminal activities at issue.

To assess whether there was sufficient evidence to convict the Appellants, we must determine, viewing the evidence in the light most favorable to the government, whether "a reasonable trier of fact could find the evidence establishes guilt beyond a reasonable doubt." *United States v. Battle*, 892 F.2d 992, 998 (11th Cir. 1990) (internal quotation marks omitted). We think in this case that a reasonable jury could find guilt beyond a reasonable doubt as to each of the Appellants. The government introduced inculpatory evidence during their trial, and each of them was present at times when it would be "highly unlikely that conspirators attempting . . . smuggling operation would have tolerated the *recurrent* presence of [] mere bystander[s]." *United States v. Baptista-Rodriguez*, 17 F.2d 1354, 1374 (11th Cir. 1994). The jury was entitled to weigh the credibility of Cunningham, Rojas-Santana, and Anderson when they testified at trial, and it was free to disbelieve their accounts and rely on the other evidence to convict. The trial court did not err by denying Appellants' motions for acquittal.

D. The Appellants' roles in the conspiracy

Cunningham and Vega-Fleites argue that the trial court erred in computing their sentences. Cunningham attacks as clearly erroneous the court's finding pursuant to U.S.S.G. § 3B1.1(b) that he was a manager or supervisor in the conspiracy hierarchy. Vega-Fleites asserts that the court clearly erred by finding that he was not a minor or minimal participant in the con-

spiracy, entitling him to a downward departure under U.S.S.G. § 3B1.2. The government contends that the court did not clearly err in determining the Appellants' roles in the conspiracy and that the court correctly applied the guidelines to compute their sentences.

We review for clear error a trial court's determination of a defendant's role in a conspiracy. *United States v. Griffin*, 945 F.2d 378, 385 (11th Cir. 1991). Here, the evidence introduced at trial fairly supports the trial court's findings with respect to the roles of Cunningham and Vega-Fleites in the importation scheme. The evidence shows that Cunningham coordinated the offloading of the cocaine, exercised decision-making authority, and played a part in planning and controlling others involved in the conspiracy. *See United States v. Jones*, 933 F.2d 1541, 1547 (11th Cir. 1991); U.S.S.G. § 3B1.1(b) comment. (n.3) (1993). Similarly, the evidence fairly suggests that Vega-Fleites had an important, rather than a minor or minimal, role in the conspiracy; he has not shown that he was plainly among the least culpable of those involved in the conspiracy. *See United States v. Zaccardi*, 924 F.2d 201, 202 (11th Cir. 1991).

E. Conclusion

We find no reversible error in this case, and affirm the Appellants' convictions and sentences.

AFFIRMED.